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No. 06-770

Supreme Court, U.S.
FILED
MAR 28 2007
OFFICE OF THE CLERK

In The
Supreme Court of the United States

STATE OF FLORIDA,
Petitioner,
v.

GABRIEL HARDEN, ET AL.
Respondents.

On Petition For a Writ of Certiorari to the Florida Supreme Court

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PETITIONER'S REPLY TO BRIEFS IN OPPOSITION

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PETITIONER'S REPLY TO BRIEF IN OPPOSITION

REPLY TO RESPONDENT'S STATEMENT

In every court below, respondent Harden admitted he and his assistants paid van drivers $25 for each Medicaid-eligible child solicited and bought to his dental clinic. As before, Harden denies he was paying for patient referrals and argues that he was merely furnishing "travel assistance" that the state was required to provide "under its contract with Medicaid." See Brief in Opp. p.2 and n.4. The Third District held that providing transportation was protected activity under the federal employee safe harbor, and the Florida Supreme Court agreed. Pet. App. pp. 23a-24a, 33a. Harden does not claim anywhere in his response, however,

that he or any employee was an authorized transportation provider under Florida law, see Pet. App. pp. 86a-92a, providing a service "for which payment may be made in whole or in part under Medicaid." See 42 C.F.R. § 1001.952(i). Nor does he identify any law or regulation that requires Florida or any state to furnish transportation to every Medicaid-eligible patient.

Harden's van drivers were not providing a Medicaid-compensable service under 42 C.F.R. § 1001.952(i). To the contrary, they were providing Medicaid patients at $25 per head. That is precisely what the state argued to the trial court. See Brief in Opp., pp. 4-5.

REPLY TO RESPONDENT'S ARGUMENT

1. Harden's discussion of preemption principles as they may apply to the employee safe harbor regulation is largely beside the point since paying for patient referrals is not protected. Harden's reliance on a comment in the proposed rule about paying employees for solicitation of program business is misplaced. See Brief in Opp., p. 17. The final rule protects only payments to employees for furnishing services that are Medicaid-compensable. Solicitation is not such a service, nor is unauthorized transportation assistance.[1]

2. Assuming for argument that paying employees for patient referrals is protected, Harden contends that Congress did not intend to allow states to prosecute Medicaid providers for such conduct and upon conviction exclude them from the Medicaid program.

This conclusion is far from self-evident, and to the extent

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[1]For this reason, Harden's attempt to restate the Questions Presented is improper. His single question presumes his payment scheme was protected by the employee safe harbor.

the proposition is arguable, it begs for a definitive answer from this Court. In every preemption case, "the purpose of Congress is in the ultimate touchstone." Medtronic, Inc. v. Lohr, 518 U.S. 470, 485 (1996). Congress has never stated an intent to preempt state prohibitions on kickbacks for patient referrals. To the contrary, as the petition demonstrates, Congress has consistently condemned kickbacks and consistently recognized the effects kickbacks have on health care costs. And it has expressly authorized the states to prosecute "violations of all applicable State laws regarding any and all aspects of fraud." 42 U.S.C. § 1396b(q)(3). Further, as demonstrated in the petition, HHS has repeatedly asserted that its safe harbor regulations do not preempt more stringent state laws.

There is no contention here that a Medicaid provider could not comply with both federal and state law. A provider need only refrain from paying kickbacks. Thus, even if the safe harbor regulation protects kickbacks for patient referrals from federal prosecution, there is still a strong presumption against preemption. This is so because of the cooperative nature of the Medicaid program, the concerns for federalism, and the fact that the Florida statute at issue is not only "designed to foster health" but intended to protect the state fisc in order that state dollars pay for actual health care needs. See Pharm. Research and Mfrs. of America v. Walsh, 538 U.S. 644, 666 (2003) (presumption against preemption has "special force" when state and federal governments are pursuing common purposes); Medtronic, 518 U.S. at 485 (noting the historic primacy of state regulation of matters of health and safety). See also Wis. Dept. of Health and Family Servs. v. Blumer, 538 U.S. 473, 495 (2002) ("Medicaid . . . is designed to advance cooperative federalism . . . . When interpreting other statutes so structured, we have not been reluctant to leave a range of permissible choices to the states, at least where the superintending federal agency has concluded that such latitude is consistent with the statute's aims."). Cooperative federalism must surely recognize the states'

compelling interest in protecting their limited health care resources.

Harden's reliance on Buckman Co. v. Plaintiffs' Legal Comm., 531 U.S. 341 (2001), and the potential for exclusion of Medicaid providers from the Medicaid program, which he contends is contrary to Congress' intent, does not make a case for preemption. Buckman, to the extent relevant, merely observed that the states have not traditionally policed fraud against federal agencies, and so a presumption against preemption of a state-law cause of action was not warranted. Medicaid, however, is a cooperative federal-state program in which the states themselves invest tens of billions of dollars every year. Money lost to fraud has a tremendous impact on state treasuries. The clear and manifest purpose of Congress, stated in the Medicaid law, authorizes states to prosecute their own laws on fraud, not fraud as defined by Congress. 42 U.S.C. § 1396b(q)(3). Hence, even if Congress would not exclude from the program a Medicaid provider who pays for patient referrals, the states may do so.

Respondent further asserts that multi-state providers will somehow suffer if state payment policies are not identical. Uniformity has never been a hallmark of the Medicaid program, however. States design and administer their own programs subject to HHS approval, and those programs have always differed. Moreover, states do not reimburse Medicaid providers for what they might expend for patient referrals, so there can be no legitimate concern about uniformity of payment policies.

3. Respondent's preemption argument on the mens rea standard of § 409.920(1)(d), Fla. Stat. (2000), pays no heed to 42 U.S.C. § 1396b(q)(3). Moreover, he does not dispute that the definitional language--"should be aware"--that the Florida Supreme Court found to allow prosecution of negligent or inadvertent conduct could not apply to the facts of this case.

Harden did not inadvertently pay $25 for every Medicaid-eligible child brought to his office. Thus, in finding the Florida law facially invalid, the Florida Supreme Court, contrary to the direction given in Dalton v. Little Rock Family Planning Servs., 516 U.S. 474, 476 (1996), invalidated the statute further necessary to dispose of the case. In addition, whether Florida would ever prosecute merely negligent or inadvertent conduct is a matter of speculation. The existence of a hypothetical or potential conflict is insufficient to warrant preemption of a state statute. Rice v. Norman Williams Co., 458 U.S. 654, 659 (1982).

4. Finally, in part II. of his brief, Harden sets up a strawman for the striking, contending that under its interpretation of 42 C.F.R. § 1001.952(i), Florida would criminally prosecute a dental office receptionist who schedules appointments or anyone engaged in such marketing activity as the distribution of flyers. With all due respect, what Florida and federal law clearly prohibit is payment "for referring an individual to a person for the furnishing . . . of any item or service for which payment may be made, in whole or in part, under the Medicaid program. . . . § 409.920(2)(e), Fla. Stat. (2000); see also 42 U.S.C. § 1320a-7b(b)(2). Receptionists who schedule appointments and employees who distribute flyers are not referring patients for Medicaid treatment. As to them, the safe harbor regulation is irrelevant. On the other hand, Harden's van drivers were paid to refer patients. That has been repeatedly admitted.

Florida's reading of 42 C.F.R. § 1001.952(i) is supported by two federal court decisions, United States v. Stark, 157 F.3d 833 (11th Cir. 1998), which respondent cannot meaningfully distinguish, and United States ex rel. Obert-Hong v. Advocate Health Care, 211 F. Supp. 2d 1045 (N.D. Ill. 2002), the holding of which he misstates.[2] Florida's reading is also supported by the

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[2]The quotation from Obert-Hong at p. 27 of respondent's brief indicates the district court found that a hospital's physician-employees

two HHS Advisory Opinions discussed in its petition. Harden does not distinguish these either, dismissing them out of hand because they are not regulations. Nevertheless, HHS is directed by law to issue advisory opinions on safe harbor arrangements. 42 U.S.C. § 1320a-7d(b). Harden does not point to a single advisory opinion that supports his interpretation of the employee safe harbor regulation.

5. In concluding, Harden attempts to minimize the effect of the decision below. The decision is neither isolated nor insignificant. Florida's Fifth District Court of Appeal has applied the Harden reasoning to the submission of false statements to the state Medicaid agency, also finding § 409.920(1)(d) and (2)(a), Fla. Stat. (2000), preempted. See State v. Rubio, 917 So. 2d 383 (Fla. Dist. Ct. App. 2005).[3] The Florida Supreme Court, on the basis of its Harden decision, recently affirmed dismissal of another Medicaid fraud case in which a physician was charged with accepting $110,000 for referral of prescriptions that were paid out of Medicaid funds. See State v. Sachs, 948 So. 2d 723 (Fla. 2007).[4]

6. The brief of respondent Polsky adds little to Harden's argument. It represents that the Florida Supreme Court found that compliance with both state and federal law was a physical

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were paid a "percentage of fees collected for referred patients." In so writing, the district court was simply reciting allegations of the relator. 211 F. Supp. 2d at 1047. In holding the physicians entitled to payment under the safe harbor, the court found their compensation depended "on the value of the work performed by the individual doctor, not the value of any referrals." Id. at 1050.

[3]The Rubio decision is under review by the Florida Supreme Court. See State v. Rubio, Case No. SC06-157. The case has been briefed and was orally argued on November 2, 2006.

[4]A petition for writ of certiorari is being filed with this Court.

impossibility. The court did not so find. Rather, it found the Florida statute preempted "because it presents an obstacle to the accomplishments of the purposes of the federal law." Pet. App. p. 19a. Polsky also insists that it is undisputed that the van drivers were Harden's employees. As explained in the petition, the State disputed this. Pet. 11-12. For purposes of its ruling, the trial court only assumed the van drivers were employees. Id.

Polsky also asserts that as a matter of law a state can never criminalize what federal law permits. Brief in Opp., p. 9. He cites no authority for this blanket proposition. Respondents have heretofore argued only that Florida law presented an obstacle to accomplishment of the purposes of federal law. Whether states may not prosecute what is clearly fraudulent conduct--intentionally paying for patients--is a question that should be decided on a national basis.

Because of its misunderstanding of the safe harbor regulation and its misapplication of preemption principles, the decision below is not only wrong, it is also a dangerous precedent that is sure to foster litigation in other states. No amount of state court litigation, however, can either refine or resolve these issues. As shown in the petition, many states have not statutorily adopted safe harbors and only three use the federal mens rea term "knowingly and willfully." Pet. App. 115a et seq. Very few states appear to require proof that a defendant acted with knowledge that his conduct was unlawful. It is, therefore, of the utmost importance that this Court decide whether, and to what extent, state Medicaid fraud laws may be preempted.

CONCLUSION

The petition for writ of certiorari should be granted, and the decision reversed.

Respectfully submitted,

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